in his report to indicate that he had made a thorough observation on the detainee over a certain period to detect the symptoms on the detainee before certifying that he fell within the category of drug dependants within the meaning of the definition in section 2 of the Act. His report is so bare and did not give any account of the result of his observation over a period to indicate the symptoms he had detected while making observation. It would appear that based solely on the positive urine test of urine sample alleged to be taken from the would-be detainee, the medical officer decided to certify that the detainee is a drug dependant within the meaning of section 2 of the Act. This is insufficient for the purpose of the definition of a drug dependant in my view.

As this is a case of detention without trial, in which "the power to detain a person without the safeguard of a court trial is too drastic to permit a lenient construction and therefore courts must be astute to ensure that the detaining authority does not transgress the limitations subject to which alone the power can be exercised" (Chandrachudy J. in *Kuso Sah* v. *State of Bihar*[1]), I feel the more justified in coming to the decision as I did having regard also to Article 5 particularly clauses (2) and (3) of the same article of the Federal Constitution and section 6(1)(a) of the Drugs Dependants (Treatment and Rehabilitation) Act 1983 to grant the applicant's application and order a writ of *habeas corpus* to be issued.

Order accordingly.

Solicitors: *Manjit Singh & Co.*

PUBLIC PROSECUTOR v. DATO KEE YONG WEE & ORS.

PUBLIC PROSECUTOR v. KOH KIM SWEE

[O.Cr.J. (K.C. Vohrah J.) 9 July 1987]

[Kuala Lumpur – Federal Territory Criminal Applications Nos. 14, 14A & 15 of 1987]

Criminal Procedure – Transmission of criminal case from a Sessions Court to High Court – Whether expedient for the ends of justice – Whether questions of law of unusual complexity would arise during the course of trial – Whether provisions empowering transfer of cases to High Court obsolete – Criminal breach of trust and abetment of criminal breach of trust – Criminal Procedure Code (F.M.S. Cap. 6), s. 417.

Banking – Production of bank statements and accounts – Only a High Court judge may make an order to compel disclosure by bank officers – Application may be made before trial begins or when trial is proceeding – Banking Act 1973, s. 36(2) – Bankers' Books (Evidence) Act 1949, s. 6.

The accused were charged with committing criminal breach of trust, an offence punishable under section 409 of the Penal Code (F.M.S. Cap. 45) and with abetment thereof, an offence punishable under sections 109 and 409. The Public Prosecutor made three applications for orders under section 417(2) of the Criminal Procedure Code (F.M.S. Cap. 6) that the trial of all three cases be transferred from the Sessions Court to the High Court under section 417(1)(cc). The main ground relied upon by the Deputy Public Prosecutor for the transfer was that such order was expedient for the ends of justice having regard to section 6 of the Bankers' Books (Evidence) Act 1949 read with section 36(2) of the Banking Act 1973. It was agreed that as the prosecution would seek to admit bank statements in respect of the charges and that if objections were to be made under section 36 of the Banking Act 1973 by "account holders in a bank" as regards these statements, the Sessions Court could not compel officers of the banks concerned to produce these statements or accounts as section 6 of the Bankers' Books (Evidence) Act 1949 only allowed a High Court judge to compel their production. It was also agreed that the joint trial of all three cases would take a considerable length of time and that it was unlikely that the parties would get a continuous hearing at one stretch in the Sessions Court. The other ground relied upon for the transfer was that it was likely that there would arise some questions of law of unusual complexity during the course of the trial.

Held, dismissing the application: (1) for all practical intents and purposes, section 417(b) of the Criminal Procedure Code has fallen into desuetude and obsolescence for transfer of cases to the High Court. For the provisions of section 417(1)(b) to be successfully invoked today, the case must be an extraordinary one. It was extremely difficult to see any question of law of unusual complexity arising in the course of trial which the judicial officers of the Sessions Court could not competently deal with. Having regard to their legal qualifications, considerable experience and professional competence, these judicial officers are legally qualified and experienced to deal with intricate points of law. In any case, no attempt was made to show what the questions of law of unusual difficulty would be in the cases which were the subject matter of the applications;

(2) there was no necessity for the original books of the bank and their entries to be produced for the purpose of the trial. Since copies of the relevant entries needed for the trial were already available to the Public Prosecutor and as Bank Negara had given its requisite consent for such disclosure, then provided the requisite procedures spelt out in sections 3, 4 and 5 of the Bankers' Books (Evidence) Act 1949 were complied with, these copies may be received at the trial of cases as *prima facie* evidence of the entries and of related matters, transactions and accounts stated therein;

(3) although only a High Court may make an order in terms of section 6 of the Bankers' Books (Evidence) Act 1949, nevertheless the application for such an order can well be made before any High Court judge before the

trial begins in the Sessions Court as indeed it can be made to a High Court judge while the trial in the Sessions Court is proceeding;

(4) it is easier to have an earlier and a continuous period of hearing before a Sessions Court than before the High Court as there are more Sessions Courts and it is easier to adjust their calendars.

Cases referred to:

(1) *Public Prosecutor* v. *Dato Yap Peng* [1987] 2 M.L.J. 311 at 318 (cited).
(2) *Lin* v. *Public Prosecutor* [1987] 1 M.L.J. 106 (apprvd).
(3) *Goh Hooi Yin* v. *Lim Teong Ghee & Ors.* [1977] 2 M.L.J. 26 (cited).
(4) *Emmot* v. *The Star Newspaper Company* (1892) 62 L.J.Q.B. 77 (cited).

CRIMINAL APPLICATIONS.

Gooi Soon Seng, Tan Hock Chuan with him (Deputy Public Prosecutors) for the applicant.

G. Sri Ram (*S.S. Mah* with him) for Dato Kee Yong Wee.

Manjeet Singh Dhillon for Wang Choon Wing.

Christopher Fernando (*Rajasegara* with him) for Yeoh Yuen Chong.

Low Hop Bing for Koh Kim Swee.

Cur. Adv. Vult.

K.C. Vohrah J.: The Public Prosecutor has made three applications for orders under section 417(2) of the Criminal Procedure Code that the trial of three cases be transferred from the Sessions Court, Kuala Lumpur, to the High Court under section 417(1)(cc) of the Code.

That an application under section 417 is open and available to the Public Prosecutor is of course clear (*per* Abdoolcader S.C.J. in *Public Prosecutor* v. *Dato Yap Peng*[1] at p. 318).

In respect of the three respondents in Criminal Application No. 14 of 1987 they are charged in the Sessions Court as follows:

"That you jointly between the 5th day of June, 1986 and the 16th day of June, 1986 at the Federal Territory of Kuala Lumpur, being agent of the Young Malaysians' Economic Development Co-operative Society Limited, to wit, directors, and in such capacities entrusted with dominion over certain property, to wit, $1,400,000 committed breach of trust in respect of the said property and that you have thereby committed an offence punishable under section 409 of the Penal Code."

The charge against the respondents in the Sessions Court in Criminal Application No. 14A of 1987 is as follows:

"That you between the 7th day of May, 1986 and 9th day of May, 1986 at the Federal Territory of Kuala Lumpur, being agents of the Young Malaysians' Economic Development Co-operative Society Limited, to wit, directors, and in such capacities entrusted with dominion over certain property, to wit, $1,900,000 committed criminal breach of trust in respect of the said property and that you have thereby committed an offence punishable under section 409 of the Penal Code."

And in respect of this charge the respondent in Criminal Application No. 15 is charged with abetment thus:

"That you between the 7th day of May, 1986 and the 9th day of May, 1986 at the Federal Territory of Kuala Lumpur, abetted the commission of the offence of criminal breach of trust of certain property, to wit, $1,900,000 belonging to the Young Malaysians' Economic Development Co-operative Society Limited, by Dato' Kee Yong Wee, Wong Choon Wing and Yeoh Yuen Chong which offence was committed in consequence of your abetment and that you have thereby committed an offence punishable under sections 109 and 409 of the Penal Code."

The three applications of the Public Prosecutor for the removal of the cases from the Sessions Court to the High Court are predicated on grounds under paragrahs (b) and (e) of section 417(1) of the Code and they read as follows:

"417.(1) Whenever it is made to appear to the High Court –

(a) ...

(b) that some question of law of unusual difficulty is likely to arise; or

(c) ...

(d) ...

(e) that such an order is expedient for the ends of justice, ...,

it may order

(aa) ...

(bb)...

(cc) that any particular case be transferred to and tried before the High Court; or

The main ground relied upon by the Deputy Public Prosecutor, Mr. Gooi, for the transfer is that specified in paragraph (e) of section 417(1) – that such "an order is expedient for the ends of justice" – and it hinges on an argument related to section 6

of the Bankers' Books (Evidence) Act 1949 read in conjunction with section 36(2) of the Banking Act 1973. He also argued that the joint trial of all cases would take a considerable length of time and that it is unlikely that the parties will get a continuous hearing at one stretch in the Sessions Court.

The other ground, which Mr. Gooi termed as a complementary ground, is that it is likely that there would arise some questions of law of unusual complexity during the course of the trial but he conceded he was not pursuing this ground vigorously.

I shall deal with this ground first. There are two charges for offences of criminal breach of trust under section 409 of the Penal Code and a charge for abetment of an offence of criminal breach of trust.

Our Penal Code is modelled on the Indian Penal Code. There is no dearth of cases on abetment or on criminal breach of trust either in its simple form under section 405 or its aggravated forms under the other sections including section 409; the considerable body of local, Singapore and Indian precedents on criminal breach of trust fill the law books of all lawyers practising criminal law in this country. These cases do indeed constitute the daily fare of most of our magistrates and Sessions Court judges who deal, in accordance with their statutory competence, either with the simple or aggravated forms of criminal breach of trust, from sections 405 to 409 of the Penal Code.

Our Sessions Court judges, like their Singapore counterparts in the District Courts, are either barristers or otherwise have other recognized legal qualifications. And under our present system generally, our Sessions Court judges do not have less than seven years standing in the Judicial and Legal Service. In Kuala Lumpur, there are four Sessions Court judges and their experience as officers of the Judicial and Legal Service ranges from 11 years to 22 years.

Section 417(1)(b) of our law corresponds with section 184(1)(b) of the Singapore Criminal Procedure Code. There have been several applications in Singapore under section 184(1)(b) for transfer of cases from the Subordinate Courts to the High Court. The reported decisions show that invariably these applications have been dismissed. P. Coomaraswamy J. in *Lin* v. *Public Prosecutor*[2] has discussed these and certain relevant Indian decisions (in respect of somewhat similar Indian provisions) in a historical perspective. Let it be noted that the provisions in India and in the Straits Settlements for transfer of cases on ground of some question of law of unusual difficulty arising were to cater for the past era where judicial officers who were supposed to hear certain difficult cases were either not legally qualified or were inexperienced to deal with them and could hardly have been expected to deal with intricate points of law. P. Coomaraswamy J. said at p. 109:

> "In the light of the decisions I have referred to, for the provisions of section 184(1)(b) to be successfully invoked today the case must be an extraordinarily rare one and I find it extremely difficult to think of one. For the historical reasons I have stated, and, given the qualifications and experience of district judges and the more senior magistrates, I am of the firm view that for all practical purposes and intent, paragraph (b) of section 184(1) has fallen into desuetude and obsolescence for transfer of cases to the High Court."

At this hearing, there was no attempt to show what the questions of law of unusual difficulty will be. I personally cannot see any. Surely it cannot be argued that our Sessions Court judges will not be able to see what the constituent ingredients of criminal breach of trust under section 409 or of abetment under section 109 of the Penal Code are. To so argue is not to give credit to the legal qualifications, the considerable experience and professional competence that these judicial officers possess. If indeed there should really be questions of law of unusual difficulty, then the prosecution and the defence are enjoined to do what they normally do in any case in any court, to clearly define and argue the issues fully and exhaustively before the court. But as I have said earlier I personally cannot see any question of law of unusual difficulty arising in the cases which are the subject matter of these applications. Rare indeed, as P. Coomaraswamy J. has observed in the case of *Lin*[2], can such an application based on the ground be invoked today. And like him I am wont to think "that for all practical purposes and intents", this particular provision of law – in our case, paragraph (b) of section 417(1) of our C.P.C. – "has fallen into desuetude and obsolescence for transfer of cases to the High Court."

To my mind, the applications under section 416(1)(b) have no merit.

I now turn to the main ground of the applications. Mr. Gooi said that in the course of the trial of the respondents on the criminal breach of trust charges the prosecution would seek to admit bank statements in respect of the charges and the prose-

cution will rely on the evidence of six to ten bankers. His argument was that in view of this, if the trial were to be proceeded with in the Sessions Court objections can be made by "account holders in a bank" as regards statements which the prosecution might seek to admit and "account holders have a legitimate right to object to the admission of such statements by virtue of section 36 of the Banking Act 1973"; if account holders withhold their consent then the Sessions Court cannot compel officers of the bank concerned "to produce those statements or accounts". The Sessions Court cannot so compel, Mr. Gooi argued, because section 6 of the Bankers' Books (Evidence) Act 1949 only allows a High Court judge to compel their production.

I shall now turn to section 36(2) of the Banking Act. It does state that, *inter alia,* an officer of a bank shall not give, divulge or reveal any information whatsoever regarding the moneys or relevant particulars of the account of the customer unless:

"(a) the customer or his personal representatives gives or give his or their permission so to do;

(b) the customer is declared bankrupt; or

(c) the information is required to assess the creditworthiness of the customer in connection with such credit bureau as may be established with the approval of the Central Bank or relating to a *bona fide* transaction or a prospective commercial transaction."

In the absence of prerequisite (a), (b) or (c) above, there can be no disclosure unless the Central Bank (Bank Negara) gives its consent. In the context of section 36(2)(a) and the present application, if an account holder refuses to give permission so to do, Bank Negara may authorize disclosure of information relating to moneys or relevant particulars of the account holder by an officer of the bank. If Bank Negara refuses to give its consent, then, in view of the proviso to section 36(1) of the Banking Act, this refusal cannot limit the powers conferred on the High Court or a judge thereof by the Bankers Books (Evidence) Act 1949. Mr. Gooi has, however, intimated to the court that the Public Prosecutor has copies of relevant entries needed for the trial – Bank Negara had given requisite consent for such disclosure. It seems to me clear that since relevant copies of the entries are already available and provided the requisite procedures spelt out in sections 3, 4 and 5 of the Bankers' Book (Evidence) Act 1949 are complied with, these copies may be received at the trial of the cases which are the subject matter of these applications as *prima facie* evidence of the entries and of related matters, transactions and accounts stated therein. I cannot see any necessity for the original books and their entries to be produced. But Mr. Gooi says since the prosecution is calling bankers as witnesses "we might as well produce the original documents". I find this argument difficult to follow as indeed also the other argument that the verification of signatures cannot be obtained against copies of signatures obtained under the Bankers' Books (Evidence) Act 1949. With photographic or photostating facilities so easily available now, I cannot see how the facsimile of specimen signatures of customers kept in a bank or signatures appearing in other banking documents cannot be used for verification. In fact, all these signatures and all other entries needed for court use, provided they are entries in a banker's book within the meaning of the Act, can easily be made available page for page, blemish for blemish after due verification under the Act without resorting to the old-fashioned method of copy typing entries with the inherent weakness of typographical errors creeping in. More so now than in 1879 or 1949, original books need not be produced in court.

More about the Bankers' Books (Evidence) Act 1949. As far the Act is concerned, it is modelled on the English Bankers' Books Evidence Act 1879. In fact, the provisions of sections 3, 4, 5, 6, 7 and 8 of the English Act are *in pari materia* with the corresponding sections 3, 4, 5, 6, 7 and 8 of the Malaysian Act. It is important to note, as was observed by Arulanandom J. in *Goh Hooi Yin* v. *Lim Teong Ghee & Ors.*[3] (at p. 28) of the Malaysian Act, that:

"(the) main object of the provisions of the Act is to enable evidence to be procured and given and to relieve *bankers from the necessity of attending and producing their books.*" (emphasis mine)

The inconvenience of producing the originals is relieved by the Act.

It means that provided the book is one of the ordinary books of the bank, the entry was made in the usual and ordinary course of business, the book is in the custody or control of the bank and the copy has been examined against the original entry (all of which matters can be proved by the affidavit or the testimony of an officer of the bank) (see sections 4 and 5), a copy of an entry in a banker's book shall, under section 3, in all legal proceedings be received as *prima facie* evidence of such entry and of the matters, transactions and accounts therein stated.

Under section 7(1), any party to a "legal proceeding" may apply for an order that he be at liber-

ty to inspect or take copies of any entries in a banker's book for the purpose of the proceedings. The expression "legal proceeding" has been defined under section 2 to mean any civil or criminal proceeding or inquiry in which evidence is or may be given and includes an arbitration. For an application under section 7 it is "the court or a judge" who makes the order requested for. The expression "court" has been defined as meaning "the High Court and in connection with any proceedings before a Sessions Court ... includes such court", unlike in England where the expression means "the court, judge, arbitrator, person or persons before whom a legal proceeding is held or taken". It would mean, in view of the restricted meaning given to the expression "court" under our Act, that an application would have to be made to the Sessions Court if the application is in respect of a proceeding before the Sessions Court and in respect of other proceedings (before a High Court, a magistrate's court or an arbitration) the application would have to be made to a judge of the High Court.

In the English Act, the expression "a judge" means "with respect to England a judge of the High Court ... and with respect to Scotland a lord ordinary of the Outer House of the Court of Session, and with respect to Ireland a judge of the High Court ... in Ireland" and it is specifically provided that the judge of a county court may with respect to any action in such court exercise the powers of a judge under the Act. In our law, the expression "judge" as used in our Act is not defined. Bearing in mind the restrictive meaning given in our law to the expression "court" as mentioned earlier, the expression "a judge" in our Act can only mean a judge of the High Court.

Mr. Gooi is thus correct when he submitted that in respect of section 6 of the Act, only a High Court judge may make an order in terms of section 6.

Section 6 reads as follows:

"6. An officer of a bank shall not, in any legal proceedings to which the bank is not a party, be compellable to produce any banker's book the contents of which can be proved under this Act or to appear as witness to prove the matters, transactions and accounts therein recorded, unless by order of a judge made for special cause."

But to say that since only a High Court may make the order in terms of section 6 and since the original records need to be produced in the trial, therefore the trial should be in the High Court is to argue that every time a case is prosecuted notwithstanding that it is triable in the magistrate's court so long as original banker's books are intended to be used the trial should be prosecuted before the High Court. This, to my mind, is going too far. It is also argued that if the trial is held in the High Court the trial will proceed smoothly as the application for the production of the original documents can be made without interrupting the smooth running of the trial unlike the situation where the trial is held in the Sessions Court as the High Court judge trying the case would be in a better position to appreciate the reasons for the application.

But that argument does not take into account that the application for such an order must necessarily involve the banker showing to the judge why he should not be compelled to produce the original documents in a legal proceeding and in that event the trial will surely be interrupted for a hearing of the matter. If a banker has complied with the provisions of sections 3, 4 and 5, he can only be compelled to produce the original documents or attend court (see *Emmot* v. *The Star Newspaper Company*[4]) by order of the High Court judge made for special cause. The "special cause" is not something that is likely to arise at the trial suddenly. Well before the trial commences, the prosecuting officer would know if he requires the originals and whether the banker would produce them and he would have marshalled his grounds to show "special cause" for an order under section 6 to issue. Clearly therefore, the application to a judge of the High Court should normally be made well before a trial commences. And of course the application can well be made before any High Court judge before the trial begins in the Sessions Court as indeed it can be made to a High Court judge while the trial in the Sessions Court is proceeding. I therefore cannot see any merit in the ground that Mr. Gooi advances in respect of section 6 of the Act.

There is lastly the ground that it would not be possible to have one stretch of days for a continuous trial in the Sessions Court unlike in the High Court as the calendars of the Sessions Court are full. No High Court judge would be unwilling to hear a non-capital punishment case which is less distressing to hear than capital punishment cases usually without the benefit of jury or assessors, if it is a matter of subjective choice. But of course his choice can never be based on whims and fancies. The three High Court judges in this building dealing with criminal cases for Selangor and the Federal

Territory have to deal with 180 capital punishment cases as of today and it is not possible to lay aside several weeks at a stretch at the expense of these cases. All the prisoners are under remand and some of them have been under remand as far back as 1983. And they await trial for their lives. And while High Court trials go on virtually every day, the number awaiting for trial does not appear to diminish as more prisoners join the queue month after month to await their turn in the docks. Surely priority should be given to these prisoners who await trial for their lives rather than to accused persons who are on bail and who otherwise lead a normal life outside. That is not to say that priority should not be given to the trial of cases of alleged criminal breach of trust of which there has been so much publicity but application should be made before the Sessions Court judges who are bound to use their discretion wisely taking into account the usual matters like the seriousness of the offence, public policy, the number of witnesses and number of counsel involved in the trial, whether dates can be adjusted, *etc.* I do think that where it comes to the Sessions Courts and the High Court it is perhaps easier to have an earlier and a continuous period of hearing before a Sessions Court than before the High Court as there are more Sessions Courts and it is easier to adjust their calendars.

My view is that having regard to all that had been said, the applications should be dismissed and they are accordingly dismissed.

Order accordingly.

Solicitors: *Sri Ram, Zulkifly & Kumar; Lawrence Dhillon & Associates; Gunaretnam & Co.; Low Hop Bing & Associates.*

ONG BAW SENG v. PUBLIC PROSECUTOR

[A.Cr.J. (Eusoff Chin J.) 14 February 1988]

[Muar – Criminal Appeal No. 51-34/87]

Criminal Law – Gaming – Expert evidence – Expert not called to give evidence in court – Certificate by expert admitted in court – Whether expert should give evidence in court – Common Gaming House Act 1953, s. 11(3) & (5).

The accused was charged under section 4(1)(c) of the Common Gaming House Act 1953 (the Act). He was found guilty by the magistrate's court, was convicted and sentenced to one day's imprisonment and a fine of $8,000.

The main ground of appeal was that the gaming expert was not called to give evidence at the trial. The gaming expert had given a certificate under section 11(3) of the Act certifying that the documents he had examined were master charts and records of stakes relating to illegal character lottery. The certificate was served on the accused and the accused had also served notice to the prosecution under section 11(5)(b) of the Act requiring the presence of the maker of the certificate.

Held, allowing the appeal: (1) section 11(5) of the Act is clear that the gaming expert need not be called by the prosecution to give evidence and that his certificate given under section 11(3) of the Act is admissible in evidence;

(2) however, the gaming expert's certificate cannot be admitted in evidence where the court requires the expert to be present as a witness or where the accused has given proper notice in writing requiring the expert to be present as a witness. Under the circumstances, the certificate should have been rejected by the court. The prosecution therefore had failed to prove a *prima facie* case against the accused;

(3) a retrial would be giving a second chance to the prosecution to prove their case. The trial magistrate should have acquitted the accused at the end of the prosecution's case;

(4) the accused was acquitted and the fine paid by the accused was refunded to him.

Case referred to:

(1) *Chah Siew Kok* v. *Public Prosecutor* [1987] 1 C.L.J. 386 (refd).

CRIMINAL APPEAL.

G.F. Nelson for the appellant.

Nor Afizah Anum (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Eusoff Chin J.: The accused Ong Baw Seng was charged under section 4(1)(c) of the Common Gaming House Act 1953 (hereinafter referred to as "the Act"). He was found guilty by the magistrate's court, was convicted and sentenced to one day's imprisonment and a fine of $8,000. The accused appealed against the conviction and sentence.

The main ground of appeal is that the gaming expert was not called to give evidence at the trial. The gaming expert had given a certificate under section 11(3) of the Act to certify that the documents he had examined were master charts and records of stakes relating to illegal character lottery.

The certificate was properly served upon the accused person under section 11(5) of the Act. About five months before the trial, the defence counsel had served on the Deputy Public Prosecu-